Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/18414/2012

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
on 18th October 2013	**On 1st November 2013**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMED SHARFRAZ

Respondent

Representation:

For the Appellant: Mr Spence – Senior Home Office Presenting Officer
For the Respondent: Mr Holt instructed by Reiss Solicitors.

DETERMINATION AND REASONS

1. Following a hearing at Bradford on 20th August 2013 I set aside the determination of First-tier Tribunal Judge Dickson, promulgated on 12th July 2013, in which he allowed Mr Sarfraz's appeal against the refusal of the Secretary of State to revoke a deportation order made against him for the reasons set out in the error of law finding and directions document dated 21st August 2013.

2. The matter comes before me for the purposes of a Resumed hearing after which I shall substitute a decision to either allow or dismiss the appeal.

3. Shortly before the hearing correspondence was received from Reiss Solicitors confirming that since the last hearing the sponsor had visited Mr Sarfraz in Pakistan where she had unfortunately suffered a miscarriage. A second letter was also received dated 15th October 2013 which was discussed with Mr Holt. It is not necessary to set out the content of the correspondence, which was copied to both advocates, and Mr Holt was given time to speak to the sponsor who attended court, to Reiss Solicitors, and the Bar Council to clarify his position. Having done so he advised the Tribunal that Reiss Solicitors considered themselves to be without instructions, as a result of recent adverse developments, and that they had withdrawn from the appeal. As a result Mr Holt was professionally obliged to take no further part in the proceedings and he too withdrew. The hearing continued with the sponsor present in court.

Background

4. Mr Sarfraz is a citizen of Pakistan born on 21st June 1981. He claimed to have entered the United Kingdom in April 2007 using a forged Italian passport. He was served with illegal entry papers on 8th May 2008 and on 28th May 2008 he was convicted at Lewes Crown Court of knowingly possessing a false or improperly obtained or another's identity document and was sentenced to a period of 12 months imprisonment and recommended for deportation.

5. On 30th August 2008 Mr Sarfraz applied for the Facilitated Return Scheme as a result of which removal directions were set for 11th August 2008 although on 23rd July 2008 he claimed asylum. On 10th August 2008 Mr Sarfraz was released from prison and placed in immigration detention. His asylum application was refused on 5th December 2008.

6. On 12th August 2008 Mr Sarfraz was served with the decision to make a deportation order against which he appealed and on 5th January 2009 he was granted bail by the Tribunal. His Appeal against the deportation decision was dismissed on 5th February 2009, a High Court review filter was refused on 23rd February 2009 and a further High Court review refused on 22nd May 2009 at which point he became 'appeal rights exhausted'.

7. The deportation order was signed on 9th June 2009 although when an enforcement team visited his address on 10th July 2009 they were told he no longer lived there. On 15th December 2009 he undertook a religious marriage with his sponsor and was granted a certificate of approval to marry in the United Kingdom on 15th June 2010. On 12th May 2010 another enforcement team visited the same address but, again, he was not present although telephone contact was established. Mr Sarfraz was detained under immigration powers on 29th June 2010. On 8th July 2010 the deportation order was served on Mr Sarfraz although, on the same day, he applied to have the order revoked based on his Article 8 rights. His appeal was refused on 14th July 2010 and he was deported to Pakistan the same day.

8. On 25th October 2010 Mr Sarfraz submitted an appeal against a decision to refuse to revoke the deportation order which was dismissed on 1st July 2011 by Judge Grant-Hutchison who made a number of adverse findings against Mr Sarfraz. His appeal rights became exhausted on 20th August 2011 although prior to this, on 4th August 2011, Mr Sarfraz married the sponsor in Pakistan.

9. Mr Sarfraz subsequently made another application for the revocation of the deportation order in September 2011 and for entry clearance as a spouse on 16th September 2011. The application was refused and the appeal against the decision dismissed on 13th August 2012. In a decision dated 10th August 2012 the Secretary of State refused to revoke the deportation order.

10. A child was born in Bradford on 25th January 2013. He is the child of Mr Sarfraz and the sponsor. It was the appeal against the refusal to revoke the deportation order that came before Judge Dickson.

Discussion

11. Paragraph 390 states:

> **Revocation of deportation order**
> 390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
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> (i) the grounds on which the order was made;
> (ii) any representations made in support of revocation;
> (iii) the interests of the community, including the maintenance of an effective immigration control;
> (iv) the interests of the applicant, including any compassionate circumstances.

12. Paragraph 390A states:

> 390A. Where paragraph 398 applies the Secretary of State or Entry Clearance Officer assessing the application will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

13. The provisions of paragraphs 391 and 392 are not applicable to this appeal.

14. In relation to paragraph 398; this provides that if the deportation of a person from the UK is conducive to the public good, because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than four years but at least twelve months, (298 (b)), paragraphs 399 and

399A are applicable. Paragraph 399 allows an individual to remain in the United Kingdom if they are able to meet the specific criteria set out in subsections (a) and (b). Mr Sarfraz is unable to do so because there is another family member who is able to care for the child, namely the child's mother (399 (a) (ii) (b). The alternative provisions are not applicable. Paragraph 399A does not apply as he is unable to meet the specific requirements of this rule.

15. Mr Sarfraz was deported from the United Kingdom as a result of the offence of identity theft for which he received a 12 month period of imprisonment. His arguments in support of the deportation order being revoked are based upon the fact he and his sponsor are legally married, their Article 8 ECHR have been breached, and because the sponsor cannot live in Pakistan.

16. The fact the parties are married is not challenged before me but the chronology shows the parties chose to get married at a time that they both knew Mr Sarfraz was subject to the deportation order with neither having a legitimate expectation that he will be permitted to re-enter the United Kingdom whilst that order remains in force.

17. I accept Mr Sarfraz is now the father of a son born on 25th January 2013 and that the best interests of the child are a very important/primary consideration, but not necessarily determinative. If the marriage and conception were solely a means to facilitate re-entry this impacts upon the weight to be attached to the same, although Lady Hale in ZH (Tanzania) expressly stated that the needs of the child cannot be devalued by the failings of their parents. I accept it is generally accepted to be in a child's best interests to be brought up in a family unit composed of both a mother and father who can provide for the child's physical, psychological, and emotional needs, but there is no evidence that this child's needs are not currently being met by his mother.

18. The status of the Immigration Rules was recently considered by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192 who found:

> 44. We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence. We accordingly respectfully do not agree with the UT that the decision-maker is not "mandated or directed" to take all the relevant article 8 criteria into account (para 38).
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> 45. Even if we were wrong about that, it would be necessary to apply a proportionality test outside the new rules as was done by the UT. Either way, the result should be the same. In these circumstances, it is a sterile question whether this is required by the new rules or it is a requirement of the general law. What matters is that it is required to be carried out if paras 399 or 399A do not apply.

> 46. There has been debate as to whether there is a one stage or two stage test. If the claimant succeeds on an application of the new rules at the first hurdle ie he shows that para 399 or 399A applies, then it can be said that he has succeeded on a one stage test. But if he does not, it is necessary to consider whether there are circumstances which are sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation. That is an exercise which is separate from a consideration of whether para 399 or 399A applies. It is the second part of a two stage approach which, for the reasons we have given, is required by the new rules. The UT concluded (para 41) that it is required because the new rules do not fully reflect Strasbourg jurisprudence. But either way, it is necessary to carry out a two stage process.

19. Mr Sarfraz cannot succeed under the Rules and therefore it is necessary to consider whether there are circumstances which are sufficiently compelling to outweigh the public interest in his remaining outside the United Kingdom.

20. Mr Sarfraz committed a serious offence and one which is unfortunately prevalent amongst some immigration offenders. The weight to be given to the Secretary of State's position based upon the prevention of crime and disorder and the deterrent effect of deportation is substantial. I accept that the deportation order was not made under UK Borders Act 2007 but the Rules provide that his deportation and exclusion from the United Kingdom is conducive to the public good.

21. In light of recent developments this is not a family life case in terms of Mr Sarfraz and the sponsor as that source of support has been withdrawn. It is whether when weighing up the refusal of the Secretary of State to revoke the deportation order for the reasons stated, which are set out in the refusal letter dated 10th August 2010 including the various attempts made by Mr Sarfraz to avoid deportation, the best interests of the child and desire of Mr Sarfraz to be able to develop a family life with his son outweighs the Secretary of State's case.

22. With the child being a young baby, still only 10 months old, his world is going to be focused upon his primary carer which is his mother. There is no evidence that his mother will not make him aware of the identity his father and indirect contact can be maintained. The fact the child was born at a time there was no legitimate expectation that Mr Sarfraz will be allowed to re-enter the United Kingdom is something both parents were aware of.

23. In the case of Latif [2012] UKUT 78 the Tribunal stated, at paragraph 25,:

> "Under paragraph 391 in the case of any applicant who has been deported following her criminal offence, continued exclusion will normally be the proper course. In other cases revocation of the order will not normally be authorised unless the situation has been materially altered, either by change of circumstances since the order was made, or by fresh information coming to light which was not before the Appellate Authorities or the Secretary of State. The

passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order"

24. Having considered the evidence with the most anxious scrutiny, as required in an appeal of this nature, it is my finding that the Secretary of State has discharged the burden of proof upon her to the required standard to show that Mr Sarfraz's continued exclusion from the United Kingdom is proportionate and necessary in light of all the facts of this appeal. I accept that there has been a material change in circumstances as a result of marriage and the birth of a child but, as a result of Mr Sarfraz's conduct, he no longer has the support of the sponsor. Indirect contact can be maintained and whilst this may not be the best form of contact, it is only that Mr Sarfraz could realistically have expected to be able to enjoy in light of his circumstances at the time of conception. It has not been shown there will be any detrimental impact upon the child by the deportation order being maintained and his father excluded which, after all, is a result of his own deliberate conduct.

Decision

25. **The First-tier Tribunal Judge materially erred in law. I have set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

26. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed…….
Upper Tribunal Judge Hanson

Dated the 31st October 2013